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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GARY BENTLEY, Defendant and Appellant.	B202135 (Los Angeles County Super. Ct. No. NA071647)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles D. Sheldon, Judge. Reversed with directions.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Scott A. Taryle and Stacy S. Schwartz, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant Gary Bentley appeals from the judgment entered following a court trial in which he was convicted of failing to register as a sex offender (former Pen. Code, § 290, subd. (a)(1)(A) (in effect in 2006)) with findings he suffered two prior felony convictions (Pen. Code, § 667, subd. (d)) and two prior felony convictions for which he served separate prison terms (Pen. Code, § 667.5, subd. (b)). The court sentenced appellant to prison for 25 years to life. We reverse the judgment with directions.

FACTUAL SUMMARY

1. *People's Evidence.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that Roger Johnson was a manager of a residence used to rehabilitate alcoholics and drug addicts. The residence was located at 5558 Dairy (Dairy) in Long Beach. Appellant and his common-law wife were living in a couples' recovery house at the location. In June 2006, it became necessary to evict appellant, and he was evicted sometime in 2006. Appellant and his common-law wife were evicted because of their drug and alcohol abuse, not because appellant was a registered sex offender. About September 13, 2006, the police called Johnson regarding appellant.

On September 13, 2006, Long Beach Police Officer Fernando Cuevas went to 173 Ellis (Ellis), a residence in Long Beach. While there, appellant told Cuevas that appellant had been living there for the past three days. Cuevas saw other evidence that appellant lived there, namely, luggage and bags full of clothes which appellant said were his.

Cuevas determined from a police computer that appellant was a registered sex offender whose registered address was the Dairy address. The Dairy address was a few blocks from the Ellis address. Cuevas confronted appellant with the fact that Cuevas had learned that appellant was a registered sex offender. Cuevas testified he asked appellant whether he lived at Dairy or Ellis, "and [appellant] changed his story. He told me he actually lived on 5558 Dairy . . . . "

Cuevas contacted Johnson at the Dairy address. Cuevas testified "[Johnson] said that the defendant had not lived there for the past three months[,]" that is, since at least July 2006. Johnson indicated appellant had lived at the Dairy address prior to July 2006.

Long Beach Police Detective Louie Galvan, assigned to the sexual assault unit, testified as follows. Galvin had People's exhibit No. 1, a sex registration form for appellant, who had a birth date in October 1960. As of September 2006, the form was the latest registration for appellant. Galvan indicated that once a crime report was generated indicating "Mr. Gary Bentley was out of compliance for failure to change his address," the report was assigned to Galvan. Based on information in the crime report and use of police computers, Galvan determined appellant was "out of compliance."

According to Galvan, appellant initialed portions of the form indicating that (1) upon changing his residence, he was required to inform in writing, within five working days the law enforcement agency with which he was last registered, and if the move was to a new jurisdiction, he had to reregister his new address in person, and (2) if he was a transient, he had to update his registration information every 30 days, apart from the annual registration requirement.

Galvan testified that if a registered sex offender was evicted from the offender's residence and became a transient, the offender was supposed to go to the local agency within the offender's jurisdiction and register within five days. The registrant was also supposed to update that registration every 30 days after the registrant had registered pursuant to the five-day requirement. If a registrant decided to go live in a park in Long Beach, the registrant would be required to register with the Long Beach Police Department. That was not done in this case. People's exhibit No. 1 was admitted in evidence.

2. *Defense Evidence.*

In defense, appellant testified as follows. About July 9, 2006, he left the facility at Dairy, because he was told he could not stay there because he was a registered sex offender. Appellant's brother came and picked up appellant's belongings. Appellant

went to Victorville to drop off appellant's belongings. Appellant went there to live with his brother, but appellant's brother's girlfriend refused to let appellant do so. Appellant returned to Long Beach and tried to live at the Dairy address again, but Johnson refused to let appellant do so. Appellant testified "[w]e were staying in parks and stuff for a little while, and . . . I didn't have nowhere to go after the money ran out." When police arrested appellant in September 2006, he did not tell police that he was living at Dairy. Instead, an officer saw the Dairy address when he looked at appellant's identification card.

On August 6, 2006, appellant was in Long Beach when he spoke to an officer Cervantes on Long Beach Boulevard. Police took appellant to jail and released him the next day. At the police station, police told appellant to go register. Police told appellant this because he told them that he was homeless. When released, appellant unsuccessfully tried to change his registration with the Long Beach Police Department. He went to Broadway and Long Beach Boulevard, saw a sign which said Long Beach Police Department, but the windows were boarded up and appellant did not know where to go afterwards.

Appellant denied that anyone ever told him that he had to register whenever he moved, or every month if he became homeless. He initialed portions of People's exhibit No. 1 but did not think it was a good idea to read the portions, and he failed to read them. Appellant was going to register on his upcoming birthday.

CONTENTIONS

Appellant contends (1) the information erroneously failed to allege the transient registration provisions of Penal Code section 290, (2) there was insufficient evidence supporting his conviction to the extent it was based on the theories that he failed to register as a transient within five working days of becoming homeless, and failed to reregister every 30 days as a transient, because he lacked actual knowledge of those registration requirements, (3) there is insufficient evidence supporting his conviction because there was no evidence he lived at the Ellis address for five or more days, (4) he

was denied effective assistance of counsel, (5) the trial court abused its discretion by failing to strike at least one strike, and his sentence violated the federal double jeopardy clause, (6) his sentence constituted cruel and unusual punishment under the federal and state Constitutions, and (7) he was entitled to additional precommitment credit.

DISCUSSION

Appellant's third contention is that there is insufficient evidence supporting his conviction. He argues there was insufficient evidence that he failed to register within five working days of "changing his . . . residence" from the Dairy to Ellis address because there was no evidence he lived at the Ellis address for more than three days. We agree. Moreover, because our resolution of the parties' arguments concerning this contention are dispositive and require reversal of the judgment, there is no need for us to decide appellant's remaining contentions.

1. *Pertinent Additional Facts.*

The felony complaint is not part of the record before this court. Cuevas's testimony at the November 14, 2006 preliminary hearing concerning (1) what happened on September 13, 2006, and (2) Cuevas's conversation with Johnson, was largely the same as Cuevas's trial testimony on those issues.

Galvan testified at the preliminary hearing concerning People's exhibit No. 1, a sex registration form for appellant. It indicated appellant last registered on November 3, 2005, at the Dairy address. Galvan used a database to determine if appellant had registered at anytime from November 3, 2005, to November 12, 2006, the date of the preliminary hearing. Galvan determined appellant "still was out of compliance."

Galvan also indicated as follows. Barring a change in appellant's information, the next time he would have been required to register would have been within five days of his birthday. If appellant had not moved, and barring any other changes, he would have been in compliance in September 2006. The issue was whether he left Dairy and was residing at Ellis. People's exhibit No. 1 was received in evidence. Appellant presented no defense evidence. At the conclusion of appellant's preliminary hearing, the court held

appellant to answer for the "offense named within the complaint" but did not otherwise identify the offense.

The information alleged that on or about September 13, 2006, "the crime of FAILURE TO REGISTER: INITIAL REGISTRATION, ADDRESS CHANGE, in violation of PENAL CODE SECTION 290(a)(1)(A), a Felony, was committed by [appellant], who being a person required to register upon coming into, and changing residence and location within a jurisdiction, based on a felony conviction, did willfully and unlawfully violate the registration provisions of Penal Code section 290."

At the conclusion of the court trial, the People argued that, under Penal Code section 290, appellant had "five days, if he moves, to go in and register, or in the alternative, if he is transient, . . . then he just has to come in and register as a transient every 30 days." The People commented that, based on Johnson's testimony, appellant and his girlfriend were evicted in June 2006 due to substance abuse. The People also commented that, based on appellant's testimony, he went to Victorville, returned, and police contacted him on Long Beach Boulevard on August 6, 2006, because he was trespassing. The People further commented that appellant was at the Ellis address on September 13, 2006. Finally, the People argued appellant "failed to comply for a period of three months . . . ." Appellant submitted the matter.

The court later stated, ". . . I feel that the proof is sufficient to prove beyond a reasonable doubt that the defendant intentionally violated his obligation to register, and that he had knowledge of his obligation to register. I find that he's guilty." The court did not then expressly refer to any particular subdivision of Penal Code section 290. At sentencing, the court stated, "I have to give you, because of the strikes that were found true and the registration, you're found guilty of the sentence [*sic*], the most severe sentence that is given." The court emphasized its sentencing decision was "very, very difficult", and stated, inter alia, "you probably can tell from my voice, and I can tell that your attorney is extremely disappointed, and I can't blame her[.]" The court sentenced appellant to prison for 25 years to life pursuant to the "Three Strikes" law.

2. *Applicable Law.*

The present offense, if any, was committed in 2006, and there is no dispute that the law proscribing any such offense was the law, Penal Code section 290[1], in effect, in 2006. (Stats. 2005, ch. 704, § 1, ch. 722, § 3.5, eff. Oct. 7, 2005.)

a. *Former Section 290, Subdivision (g)(2).*

Former section 290, subdivision (g)(2), as it read in 2006, stated, in relevant part, ". . . any person who is required to register under this section based on a felony conviction . . . who willfully *violates any requirement of this section* . . . is guilty of a felony . . . ." (Italics added.) This subdivision itself does not identify the specified "requirement[s]"; resort must be made to the rest of the section to identify these.

b. *Changing from Residence to Residence: Former Section 290, Subdivision (a)(1)(A).*

Former section 290, subdivision (a)(1)(A), as it read in 2006, stated, in relevant part, "Every person . . . , for the rest of his or her life *while residing* in California, . . . shall be required to register with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing in an unincorporated area or city that has no police department, . . . within five working days of *coming into*, or *changing his or her residence within*, *any city*, county, or city and county, or campus in which he or she temporarily resides." (Italics added.)

c. *Transient Registration, Including Changing from Residence to Transience: Former Section 290, Subdivision (a)(1)(C).*

Former section 290, subdivision (a)(1)(C), as it read in 2006, is also pertinent. That subdivision stated, in relevant part, "(C) Every person . . . , for the rest of his or her life *while living as a transient* in California shall be required to register, as follows: [¶] (i) A transient must register, or reregister if the person has previously registered, within five working days from release from incarceration, placement or commitment, or release

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[1] Subsequent statutory references are to the Penal Code.

on probation, pursuant to paragraph (1) of subdivision (a), . . . If a transient is not physically present in any one jurisdiction for five consecutive working days, he or she must register in the jurisdiction in which he or she is physically present on the fifth working day following release, pursuant to paragraph (1) of subdivision (a). Beginning on or before the 30th day following initial registration upon release, a transient must reregister no less than once every 30 days thereafter. A transient shall register with the chief of police of the city in which he or she is physically present within that 30-day period, or the sheriff of the county if he or she is physically present in an unincorporated area or city that has no police department, . . . A transient must reregister no less than once every 30 days regardless of the length of time he or she has been physically present in the particular jurisdiction in which he or she reregisters. If a transient fails to reregister within any 30-day period, he or she may be prosecuted in any jurisdiction in which he or she is physically present. [¶] (ii) A transient who moves to a residence shall have five working days within which to register at that address, in accordance with subparagraph (A) of paragraph (1) of subdivision (a). *A person registered at a residence address* in accordance with subparagraph (A) of paragraph (1) of subdivision (a), *who becomes transient* shall have *five working days within which to reregister* as a transient in accordance with clause (i)." (Italics added.)

d. *"Residence" and "Transient" Defined: Former Section 290, Subdivision (a)(1)(C).*

Former section 290, subdivision (a)(1)(C)(vii), as it read in 2006, stated, "For purposes of this section, 'transient' means a person who has no residence. 'Residence' means one or more addresses at which a person regularly resides, regardless of the number of days or nights spent there, such as a shelter or structure that can be located by a street address, including, but not limited to, houses, apartment buildings, motels, hotels, homeless shelters, and recreational and other vehicles."

3. *There Was Insufficient Evidence Appellant "Chang[ed] His . . . Residence" from Dairy to Ellis in Violation of Section 290, Subdivision (a)(1)(A), Because There Was Insufficient Evidence Appellant Lived at the Ellis Address for More than Three Days.*

In the present case, appellant left his Dairy residence and, apparently, eventually lived at Ellis. However, there was no evidence that appellant lived at Ellis for more than three days; therefore, the five-day grace period of former section 290, subdivision (a)(1)(A) as it read in 2006, had not expired.[2] We note respondent does not claim there was sufficient evidence of such a former subdivision (a)(1)(A) violation based on a change of residence from Dairy to Ellis. We conclude there was insufficient evidence that appellant failed to register within five working days of "changing his . . . residence" from the Dairy to the Ellis address in Long Beach.

4. *There Was Insufficient Evidence Supporting Respondent's Alternate Theory that Appellant "Chang[ed] His . . . Residence" Simply by Leaving His Dairy Residence.*

Respondent claims as an alternate theory that appellant violated former section 290, subdivision (a)(1)(A), as it read in 2006, by failing to reregister after leaving his registered Dairy address. What respondent is really arguing is that an offender is

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[2] After police discovered appellant was a registered sex offender whose registered address was the Dairy address, appellant changed his story that he lived at Ellis and admitted he lived at Dairy. The false statement was evidence of consciousness of guilt, that is, wrongdoing, which arguably supported an inference that he knew that, in violation of registration law, he had lived at Ellis more than five days. However, the false statement arguably supported other independent inferences, namely, (1) he did not want police to know he had drug and alcohol problems, (2) he did not want police to know he was a registered sex offender (whether or not he believed he had violated registration laws), and/or (3) he knew he had violated a registration law(s) other than the registration law that he register within five days of living at Ellis. We note police testified that luggage and bags of clothes, which appellant said were his, were next to a couch and in what could have been a living room. This supported an inference that any stay of appellant at Ellis prior to the arrival of police had in fact been brief. Substantial evidence is evidence that is reasonable, credible, of *solid* value, and reasonably inspires confidence in the judgment. (*People v. Bailey* (1991) 1 Cal.App.4th 459, 462.) The evidence of consciousness of wrongdoing does not provide substantial, solid, evidence that appellant had been at Ellis more than five days, instead of merely three.

"changing his . . . residence" within the meaning of former subdivision (a)(1)(A) when, without more, the offender leaves his or her registered residence and becomes a transient. We reject the argument. As indicated below, Penal Code section 290 underwent amendment in 2005 with the result that, in 2006, the phrase "changing . . . his residence" in subdivision (a)(1)(A), applied to a change from a residence to a residence, but did not apply to a change from residence to transience. Instead, in 2006, as a result of the amendments, a change from residence to transience was a separate offense proscribed by section 290, subdivision (a)(1)*(C)*.

There was no evidence that appellant concurrently had multiple residences when he resided at the Dairy address or, therefore, that he could have left Dairy and then gone to another address where he resided. Instead, there was evidence that once appellant left Dairy, he was homeless. That is, once appellant left Dairy, he became a transient. (Former subdivision (a)(1)(C)(vii), as it read in 2006.)

There is no dispute that an offender "chang[es] his or her residence" when the offender leaves his or her registered residence and begins residing at another residence, that is, when the offender moves from residence to residence. However, former subdivision (a)(1)(A), as it read in 2006, does not expressly state that an offender "chang[es] his or her residence" when the offender leaves his or her registered residence and becomes a transient. The question is: what is the meaning of the word "change[]" in the phrase "chang[es] his or her residence"?

a. *Pertinent Legislative History.*

In *2004*, former section 290, subdivision (a)(1)(A), which pertained to *changing a residence or location*, provided, in relevant part, "Every person . . . , for the rest of his or her life while *residing in*, or, if he or she has no residence, while *located within* California, . . . shall be required to register with the chief of police of the city in which he or she is residing, or if he or she has no residence, is located, or the sheriff of the county if he or she is residing, or if he or she has no residence, is located, in an unincorporated area or city that has no police department, . . . within five working days of coming into,

or *changing his or her* residence *or location* within, any city, county, or city and county, or campus in which he or she temporarily resides, or, if he or she has no residence, *is located*." (Italics added.)

In 2004, former section 290, subdivision (a)(1)(C), which pertained to *transient updating* requirements, provided, "If the person who is registering has no residence address, he or she shall update his or her registration no less than once every 60 days in addition to the requirement in subparagraph (A), . . . with the entity or entities described in subparagraph (A) in whose jurisdiction he or she is located at the time he or she is updating the registration."

Former section 290, subdivision (a)(1)(A) was amended in 2004,[3] with the result that, in 2005, *the phrase "or location" was deleted* and former section 290, subdivision (a)(1)(A) provided, in relevant part: "Every person . . . , for the rest of his or her life while *residing in* California, . . . shall be required to register with the chief of police of the city in which he or she is residing, or the sheriff of the county if he or she is residing is located,[4] in an unincorporated area or city that has no police department, . . . within five working days of coming into, or *changing his or her residence* within, any city, county, or city and county, or campus in which he or she temporarily resides." (Italics added.)

Former section 290, subdivision (a)(1)(C), was amended in 2004, with the result that, in 2005, former section 290, subdivision (a)(1)(C), pertained to *transient registration* (or reregistration) and provided, in relevant part, "(C) Every person . . . , for the rest of his or her life *while living as a transient* in California shall be required to register, as follows: [¶] (i) A transient must register, or reregister if the person has

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[3] The amendment was the result of the holding in *People v. North* (2003) 112 Cal.App.4th 621 (*North*), discussed *infra*.

[4] Effective October 7, 2005, the above phrase and comma "is located," were deleted (apparently as errata) from former section 290, subdivision (a)(1)(A) as part of urgency legislation. (Stats. 2005, ch. 704, § 1, ch. 722, § 3.5, eff. Oct. 7, 2005.)

previously registered, within five working days from release from incarceration, placement or commitment, or release on probation, pursuant to paragraph (1) of subdivision (a), . . . If a transient is not physically present in any one jurisdiction for five consecutive working days, he or she must register in the jurisdiction in which he or she is physically present on the fifth working day following release, pursuant to paragraph (1) of subdivision (a). Beginning on or before the 30th day following initial registration upon release, a transient must reregister no less than once every 30 days thereafter. A transient shall register with the chief of police of the city in which he or she is physically present within that 30-day period, or the sheriff of the county if he or she is physically present in an unincorporated area or city that has no police department, . . . A transient must reregister no less than once every 30 days regardless of the length of time he or she has been physically present in the particular jurisdiction in which he or she reregisters. If a transient fails to reregister within any 30-day period, he or she may be prosecuted in any jurisdiction in which he or she is physically present. [¶] (ii) A transient who moves to a residence shall have five working days within which to register at that address, in accordance with subparagraph (A) of paragraph (1) of subdivision (a). *A person registered at a residence address in accordance with subparagraph (A) of paragraph (1) of subdivision (a), who becomes transient shall have five working days within which to reregister as a transient* in accordance with clause (i)." (Italics added.)

b. *Respondent's Alternate Theory is Erroneous Because the Omission of the Phrase "Or Location" from Former Section 290, Subdivision (a)(1)(A), As It Read in 2006, Evidences Legislative Intent that the Phrase "Changing His . . . Residence" Does Not Apply to an Offender Leaving a Registered Residence and Becoming a Transient.*

As noted, in 2004, former section 290, subdivision (a)(1)(A) contained the phrase "changing his or her residence *or location*." (Italics added.) As a result of the amendment, former subdivision (a)(1)(A), in 2005, omitted, inter alia, the italicized phrase "or location."

When an offender leaves the offender's registered residence and becomes a transient, the offender is necessarily leaving a residence and "changing his or her residence *or location*" within the meaning of the 2004 version of former section 290, subdivision (a)(1)(A). The fact, therefore, that the Legislature omitted from the 2005 version of former section 290, subdivision (a)(1)(A), the italicized phrase "or location" evidences legislative intent that the phrase "changing his or her residence" in the 2005 version does not apply to an offender's leaving a registered residence and becoming a transient. This inference of legislative intent also applies to the 2006 version of that subdivision (the version applicable to the present case), which does not materially differ from the 2005 version.

c. *Respondent's Alternate Theory is Erroneous Because, If the Phrase "Changing His . . . Residence" Applies to an Offender Leaving a Registered Residence and Becoming a Transient, then the Second Sentence in former Section 290, Subdivision (a)(1)(C)(ii) as it Read in 2006, Is Surplusage.*

As noted, the 2004 version of former section 290, subdivision (a)(1)(C) did not contain, inter alia, the requirement added to the 2005 version of that former subdivision that "*A person registered at a residence address in accordance with subparagraph (A) of paragraph (1) of subdivision (a), who becomes transient shall have five working days within which to reregister as a transient . . . .*" If "changing his or her residence" within the meaning of former subdivision (a)(1)(A) as it read in 2005, included leaving one's registered residence and becoming a transient, the above italicized addition to the 2005 version of former subdivision (a)(1)(C) (in former subdivision (a)(1)(C)(ii)) would be surplusage. The fact, therefore, that the Legislature added the above italicized requirement to the 2005 version of former subdivision (a)(1)(C) evidences a legislative intent that the phrase "changing his or her residence" in the 2005 version of former subdivision (a)(1)(A) does not apply to an offender's leaving a registered residence and becoming a transient. This inference of legislative intent also applies to the 2006 version of that subdivision, which does not materially differ from the 2005 version.

d. *The Reasoning of People v. Balkin Evidences the Phrase "Changing His . . . Residence" Does Not Apply to an Offender Leaving a Registered Residence and Becoming a Transient.*

A case from Division Five of this district, *People v. Balkin* (2006) 145 Cal.App.4th 487 (*Balkin*), cited by appellant, is illuminating. That case involved the 2005 version of former section 290, and, in particular, the interplay of former subdivision (a)(1)(A) and the first two sentences of former subdivision (a)(1)(C)*(i)* as they related to an offense which occurred in April 2005.

In *Balkin*, police arrested on April 21, 2005, in Los Angeles a sex offender who had been released on parole on April 3, 2005. The defendant told police that he received mail at 628 San Julian Street.[5] The defendant was charged with a violation of former section 290, subdivision (a)(1)(A), in effect in 2005. (*Balkin*, *supra*, 145 Cal.App.4th at pp. 491-493.)

Balkin stated, "Defendant argues that there was insufficient evidence to support his conviction for willfully failing to register as a sex offender within five working days of entering Los Angeles." (*Balkin*, *supra*, 145 Cal.App.4th at p. 490.) *Balkin* also stated, "Defendant argues, 'There was no proof of any kind that [he] entered Los Angeles, or changed his residence within Los Angeles, more than five working days before he was arrested, or even that he was in Los Angeles for any five-day period between April 3 and 21.' We agree." (Id. at p. 492.) Earlier in *Balkin*, the court stated, "The dispositive issue is whether there is substantial evidence defendant failed to register within five days of entering the City or County of Los Angeles, an essential element of a violation of section 290, subdivision (a)(1)(A). We conclude there is no such evidence." (*Balkin*, at pp. 488-489.)

Balkin noted, "Defendant was *not* charged with violating section 290, subdivision (a)(1)(C)*(i)*[.]" (*Balkin*, *supra*, 145 Cal.App.4th at p. 492, italics added.) *Balkin* quoted

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5 We note the address suggests a skid row address.

the first two sentences in the 2005 version of that subdivision (which we previously have quoted in relevant part). *Balkin* then stated, "Moreover, there was no evidence defendant was a 'transient' within the meaning of section 290, subdivision (a)(1)(C). The sole evidence was that he had a mailing address. But there was no evidence to establish when defendant secured that address or moved into the city or county—it could have been one day prior to his arrest or more than five days." (*Balkin*, at pp. 492-493.)

Balkin then stated, "*Under section 290, subdivision (a)(1)(A), a failure to register within five working days of coming into a city or county is one offense. Defendant's failure to register within five working days of his release from a place of incarceration while a transient is a separate offense under section 290, subdivision (a)(1)(C)(i). Failing to register in the city or county in which the offender is residing within five days of entering the municipality is a separate offense, which is not included in a violation of section 290, subdivision (a)(1)(C)(i).* (See *People v. Meeks* (2004) 123 Cal.App.4th 695, 703 [failure to register when one moves to a different residence is a separate and discrete offense from failing to register on a defendant's birthday]; *People v. Davis* (2002) 102 Cal.App.4th 377, 384–385 [court lacks jurisdiction to convict a defendant of an offense that is neither charged nor necessarily included in the alleged crime].) There was insufficient evidence that defendant had been present within the City or County of Los Angeles for five working days prior to his arrest on April 21, 2005. Therefore, the prosecutor failed to prove defendant violated section 290, subdivision (a)(1)(A)." (*Balkin, supra*, 145 Cal.App.4th at p. 493, italics added.) *Balkin* reversed the judgment and ordered that the information be dismissed upon issuance of the remittitur. (*Id.* at p. 494.)

Thus, *Balkin*, considering former section 290, in effect in 2005, concluded, inter alia, that (1) a person who fails to register within five working days of "changing his or her residence" within the meaning of former section 290, subdivision (a)(1)(A) commits a different offense than a person who fails to register within five working days from "release from incarceration" within the meaning of subdivision (a)(1)(C)(i), and (2) the

former offense is not included in the latter (therefore, a violation of subdivision (a)(1)(C)(i), does not constitute a violation of subdivision (a)(1)(A)).

Former section 290, subdivision (a)(1)(A) in relevant part, read the same in 2005 and 2006. So did subdivision (a)(1)(C)(i). This is equally true of subdivision (a)(1)(C)(ii). Although *Balkin* involved the interplay of subdivisions (a)(1)(A) and (a)(1)(C)*(i)*, we believe *Balkin's* reasoning applies to the present case, which involves the interplay of subdivisions (a)(1)(A) and (a)(1)(C)*(ii)* as they read in 2006. We conclude that (1) a person who fails to register within five working days of "changing his or her residence" within the meaning of former subdivision (a)(1)(A), in effect in 2006, commits a different offense than a person who violates former subdivision (a)(1)(C)(ii), which provides, "A person registered at a residence address in accordance with subparagraph (A) of paragraph (1) of subdivision (a), who becomes transient shall have five working days within which to reregister as a transient in accordance with clause (i)." This too permits the inference that the Legislature did not intend the phrase "changing his or her residence" in the 2006 version of former subdivision (a)(1)(A) to apply to an offender's leaving a registered residence and becoming a transient.

We note respondent does not discuss the facts that the 2006 version of former section 290, subdivision (a)(1)(A): (1) omits the phrase "or location," found in the 2004 version of that subdivision, and (2) reflects the addition of the second sentence of subdivision (a)(1)(C)(ii), not found in the 2004 version of subdivision (a)(1)(C). We also note that, although appellant cited *Balkin*, respondent does not discuss it.

We conclude that an offender does not "chang[e] his or her residence" within the meaning of former subdivision (a)(1)(A), as it read in 2006, when, as here, the offender leaves the offender's registered residence and becomes a transient. Accordingly, we hold there was insufficient evidence to support appellant's conviction for a violation of section 290, subdivision (a)(1)(A). Insofar as the People sought to prosecute appellant for leaving Dairy without registering, our holding does not mean appellant was entitled to

escape liability but only that he should have been prosecuted under the correct law: former subdivision (a)(1)(C)(ii).

e. *People v. North Does Not Compel A Contrary Conclusion.*

Respondent argues, "In [*North*], *supra*, 112 Cal.App.4th at page 635, the court considered this very issue and held that '[a]n offender registered as a resident who becomes transient has five working days to register as a transient under the terms of section 290, subdivision[] (a)(1)(A) . . . .' It confirmed that subdivision (a)(1)(A) 'accounts for offenders who change status from resident to transient,' as did appellant in the instant case. (*Ibid.*) Moreover, despite determining that the language in the statute requiring transients to register their 'locations' was unconstitutionally vague, it nevertheless affirmed that '[t]he provisions governing reregistration after a change from residential to transient status are not unconstitutionally vague . . . .' (*Id.* at p. 636.)"

We reject respondent's argument. *North* involved judicial interpretation of former section 290, as it existed in *2000*, which is when the offenses of the defendant in that case occurred. (*North*, *supra*, 112 Cal.App.4th at p. 629.) The 2000 and 2004 versions of former section 290, subdivisions (a)(1)(A) and (C) were, in relevant part, the same,[6] and both versions preceded the 2004 amendments to section 290, subdivision (a), which became effective in 2005. In fact, the amendments were a legislative response to *North*'*s* holding. As discussed, these amendments resulted in, inter alia, the omission of the phrase "or location," from, and the addition of the second sentence of subdivision (a)(1)(C)(ii) to, the 2005 versions of subdivision (a)(1)(A) and (C), respectively. And *Balkin* was decided after *North*.

5. *Concluding Remarks*.

The problem with this case largely stems from the fact that apparently no one considered the changes to the 2005 version of former section 290, subdivision (a)(1)(A) and (C) effected by the 2004 legislative amendments. It appears the changes went

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[6] The only difference was that the 90-day requirement of former section 290, subdivision (a)(1)(C) in 2000, became a 60-day requirement in that subdivision in 2004.

unnoticed at least as early as the filing of the information in this case. The information alleged, inter alia, that in 2006, a violation of subdivision (a)(1)*(A)* was committed by appellant, who was required to register upon "changing residence *and location*" (italics added) even though, as we have discussed, the word "location" nowhere appears in former subdivision (a)(1)(A) as it read in 2006. And appellant's counsel filed no challenge to the information. Nor, during appellant's 2007 trial, did anyone apparently consider *Balkin*.

The prosecutor's closing argument did not clarify matters. As noted, the prosecutor argued what he characterized as alternative theories of guilt, namely: (1) appellant failed to register when he moved and (2) appellant failed to register every 30 days as a transient. However, as to the latter theory, former subdivision (a)(1)(A), as it read in 2006, contains no 30-day requirement, and the theory appears to have been a reference to subdivision (a)(1)(C)*(i)*. However, we note *Balkin* held that another subdivision (a)(1)(C)(i) transient requirement (the five-day transient requirement) was not a violation of subdivision (a)(1)(A). Appellant's counsel did not vigorously argue the matter but submitted it. Similar to the case in *Balkin*, in the present case there was no reference in the information or verdict to an alleged transient status which might have served as a basis for liability pursuant to subdivision (a)(1)(C)(i) or (ii). The court convicted appellant based on an information which alleged only a violation of subdivision (a)(1)(A). Respondent does not argue on appeal that appellant's conviction may be sustained based on a 30-day transient theory.[7]

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[7] Although evidence was presented at the preliminary hearing that appellant failed to register between November 2005 and November 2006, Galvan effectively testified at the preliminary hearing that, barring other changes and barring the fact that appellant had moved, appellant was "in compliance in September" and the issue was whether appellant "actually left 5558 Dairy and was residing at 173 Ellis Street[.]" In other words, the focus at the preliminary hearing was whether appellant changed from residence to residence, not whether he had violated transient provisions of former section 290, subdivision (a)(1)(C)(i) or (ii) as they read in 2006. Unlike the case at trial, no evidence was presented at the preliminary hearing that appellant was a transient when he moved from Dairy, or otherwise. Respondent does not claim the felony complaint alleged a

Finally, we note our Legislature has since clarified, by the new Sex Offender Registration Act (Act) which became effective October 13, 2007, that the changing of residence, and transient, requirements of section 290 are separate. The Act, inter alia, redesignated various registration provisions. As pertinent here, the requirement, previously found in former section 290, subdivision (a)(1)(A), as it read in 2006, that an offender register within five working days of "changing his or her residence," is found, after the effective date of the Act, in section 290, subdivision (b). The 30-day transient requirement, previously found in former section 290, subdivision (a)(1)(C)(i), as it read in 2006, is found, after the effective date of the Act, *in a completely new section and subdivision*: section 290.011, subdivision (a). Similarly, the five-day requirement governing an offender's transition from a resident to a transient, previously found in the second sentence of former section 290, subdivision (a)(1)(C)(ii), as it read in 2006, is found, after the effective date of the Act, in the new section 290.011, subdivision (a).[8]

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violation of former subdivision (a)(1)(C). Although, as appellant suggests in his argument supporting his first contention, it appears appellant could not have been convicted of a 2006 violation of former subdivision (a)(1)(C)(i) or (ii), or convicted on a 30-day transient violation, for the additional reason that the record fails to demonstrate that any such offenses were shown by evidence presented at the preliminary hearing (see *People v. Burnett* (1999) 71 Cal.App.4th 151, 165, 177), there is no need to decide these issues or whether there was sufficient evidence presented at trial of a 30-day transient violation.

[8] Our reversal of the judgment on the ground of evidentiary insufficiency bars a retrial. (*People v. Seel* (2004) 34 Cal.4th 535, 544.)

DISPOSITION

The judgment is reversed. Upon issuance of the remittitur, the trial court is directed to dismiss the information.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.